No. 00-289

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In The

Supreme Court of the United States

J.T. YARNELL, in His Official Capacity as Chief Engineer of the Missouri Department of Transportation, *et al.*,

Petitioners,

v.

CORRECTED COPY

MICHAEL CUFFLEY and the KNIGHTS OF THE KU KLUX KLAN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* VIRGINIA, ARKANSAS, CALIFORNIA, COLORADO, DISTRICT OF COLUMBIA, IDAHO, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MINNESOTA, MISSISSIPPI, MONTANA, NEVADA, NEW YORK, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, TENNESSEE, VERMONT, WASHINGTON, WEST VIRGINIA, AND WYOMING IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICI CURIAE* VIRGINIA, ARKANSAS, CALIFORNIA, COLORADO, DISTRICT OF COLUMBIA, IDAHO, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MINNESOTA, MISSISSIPPI, MONTANA, NEVADA, NEW YORK, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, TENNESSEE, VERMONT, WASHINGTON, WEST VIRGINIA, AND WYOMING IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICI CURIAE*

The *Amici* are among the States that share the deep concern felt by Missouri at the prospect of being forced to honor the Ku Klux Klan on signs posted by the State along public highways. Each of the *Amici* operates an adopt-a-highway program similar to the one operated by Missouri.[1] Each seeks to promote civic responsibility–and save taxpayer dollars–by recruiting, training and coordinating volunteers to assist in performing an essential governmental function: keeping the roadsides free of trash. Each has chosen to erect signs recognizing the volunteers recruited to perform this task. None have dedicated those signs to the speech *of* those volunteers. Even less have the States dedicated their signs to the speech of organizations that come to the program unbidden and unapproved. Yet, all the States may be deemed to have done so if courts in their own jurisdictions follow the decision of the Eighth Circuit.

The *Amici* are persuaded that the court of appeals has erred and that the Constitution does not require the signs

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[1] Vermont is an exception. It does not operate an adopt-a-highway program, but supports the rights of the States, as described in this brief.

the Klan demands. The issue is of such importance to the *Amici* that they urge the Court to take it up now, rather than leave it to be fought over State-by-State and court-by-court. Protracted litigation on a matter of such obvious sensitivity carries with it the danger of unnecessary societal dissension and loss of public confidence in our institutions of government. For these reasons, the *Amici* respectfully urge the Court to grant the petition for certiorari and to reverse the decision of the court of appeals.

FACTUAL BACKGROUND

There is no need to repeat here the facts of this particular case. They are presented by the petition for writ of certiorari filed by the State of Missouri. The *Amici* do, however, wish to underscore those broader societal facts that continue to cause concern about the Ku Klux Klan, and that make urgent the need to resolve the issues presented by this appeal. "There is little doubt that the Klan's main objective is to establish a racist white government in the United States." *Capitol Square Review and Advisory Bd. v. Pinnette*, 515 U.S. 753, 770 (1995) (Thomas, J., concurring). "There is uncontradicted evidence that violent racism has become the Klan's hallmark and has not subsided to any appreciable extent since the Klan's founding shortly after the Civil War." *McMullen v. Carson*, 754 F.2d 936, 938 (11th Cir. 1985). *Accord, Marshall v. Bramer*, 110 F.R.D. 232, 235 (W.D. Ky. 1985) (taking judicial notice of numerous "cases in which the Ku Klux Klan is identified as a violence-prone group with a history of harassing, intimidating and injuring blacks and members

of other minority groups"), *aff'd*, 828 F.2d 355 (6th Cir. 1987).

As shown by records maintained by the Southern Poverty Law Center, violence, vandalism and intimidation continue to be perpetrated by Klansmen, or in the Klan's name. Recent examples include incidents last year in California, Florida, Maryland, Tennessee and Virginia in which the property of black Americans–including one church–was defaced with the mark, "KKK." Cross burnings were perpetrated in many regions of the country, and a Pennsylvania Klansman was convicted in Virginia for burning a cross with intent to intimidate. Arson, death threats, rape and attempted murder were also traced to Klansmen in several states. *See* Southern Poverty Law Center, *Intelligence Project: Hate Incidents 1999* <http://www.splcenter.org/intelligenceproject/ip-index.html> (visited Sept. 18, 2000).

Against this background, States now face the prospect of being forced to validate the Klan through the erection of highway signs announcing its presence as a partner of government. The *Amici* view such signs as interfering with the right of States to control their own speech, making them implicit apologists for a group opposed to the fundamental principles on which our governments are founded. Even if such signs are viewed as the speech of the Klan, they are nevertheless likely to disrupt the efficiency of government, including the efficiency of the very program that adopt-a-highway signs are intended to promote. Either way, the facts not only support the States in denying signs to the Klan, but underscore the importance of the Court's hearing this appeal.

REASONS FOR GRANTING THE WRIT

Summary

Whose speech is it? This is the fundamental issue in this case. Yet it is an issue which the court of appeals cast aside as irrelevant. The district court also erred; it took up the issue but decided it incorrectly. The speech at issue is found on signs posted by a State in its right-of-way and recognizes organizations that do the State's work. The signs are not the speech of the organizations they recognize. They are the speech of the State, be it Missouri or any of the other forty-seven States that operate similar adopt-a-highway programs. As this Court has repeatedly recognized, government has the right to control its own speech. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995). The First Amendment is not implicated. The Court should hear this case in order to vindicate and further clarify the right of States to engage in speech.

Moreover, even if such a highway sign were the speech of the organization it names, the State should still be free to prevent the Ku Klux Klan from participating in the adopt-a-highway program and/or from announcing itself on the signs that ordinarily accompany such participation. As this Court has recognized, government as employer may impose restraints on the job-related speech of its employees that it could not impose on the public at large. Such restraints are not subject to strict scrutiny but are judged by the balancing test described by this Court in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968) and *United States v. National Treasury Employees Union*, 513 U.S.

454 (1995) ("*NTEU*"). When volunteers undertake to perform an essential governmental function under governmental supervision–such as cleaning trash from the roadside–they subject themselves to the same restraints as could be imposed by government on the employees whose tasks they assume. The restraint on speech imposed here by Missouri satisfies the balancing test of *Pickering/NTEU*. The Court should hear this case in order to vindicate and clarify the right of States to use volunteers without surrendering the authority necessary to manage public business efficiently and effectively.

THE HIGHWAY SIGNS AT ISSUE ARE THE SPEECH OF THE STATE.

A State Has A Right To Control Its Own Speech.

The First Amendment protects citizens against governmental interference with their freedom of speech. It is a cherished freedom and one that the courts guard zealously, and rightly so. Yet, in its zeal, the court of appeals has minimized the fact that *government* can also engage in speech. When it does, the content of that message does not implicate free speech guarantees of the First Amendment.

Government speech is commonplace. Sometimes, the purpose of the speech is to advance a governmental goal or policy, such as discouraging teenage drinking, promoting tourism or encouraging use of seatbelts. At other times, the purpose is simply to commemorate some person, place, or event that figures in the public life of the state or nation. When a governor issues a proclamation

recognizing Consumer Protection Week or Agriculture Week in his State, it is government speech. When a State legislature erects a monument to the State's war dead, it is government speech. When the U.S. Postal Service issues commemorative stamps to "Celebrate the Century," it is government speech. When New Hampshire emblazons its license plates with the slogan, "Live Free or Die," it is "the *State's* ideological message" that is displayed. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (emphasis added).

"[W]hen the State is the speaker, it may make content-based choices." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995). The First Amendment "permit[s] the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message." *Id.* When government speaks, individuals and groups are free to disagree with what is said, or the way it is said. And, they cannot be made to serve as couriers of the government's message. *See Wooley*, 430 U.S. at 717. They also have a right to change the government's message, if they can, through the democratic process. Yet, they have no right to use a lawsuit to compel the government to change its message or to adopt a message it abhors. The First Amendment confers no such license. *See, Rust v. Sullivan*, 500 U.S. 173 (1991) (rejecting challenge to government regulation limiting expenditure of public funds to family planning message favoring childbirth over abortion). Thus, a State does not violate the First Amendment by controlling its own speech. As the discussion that follows will show, the erection of a highway sign honoring a volunteer organization that has removed litter from the roadside *is* the speech of the

State, and is not subject to compulsion under the First Amendment.

Adopt-A-Highway Signs Are The Speech Of The State.

When a State posts an adopt-a-highway sign honoring an organization that has removed roadside litter – such as the sign sought here by the Klan – the sign contains the speech of the State, not the speech of the organization. This is shown by the following six points:

First, the signs are purchased by the State, posted by the State in the State right-of-way and remain the property of the State. Ownership is key because "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 46 (1983) (quotation marks and citations omitted). Thus, as the owner of the signs, the State has authority to decide whether they will be designed to convey the messages of private citizens, or its own message.

Second, maintaining the highways is a function performed from time out of mind by government as one of its essential duties. Keeping the roadsides clean is part of that function. Whether government performs that function by hiring and supervising employees, or by recruiting and coordinating volunteers, makes no difference. It remains a job for government. Missouri–and most States–now carry out that job, in part, through adopt-a-highway programs. The signs at issue here are part of that program, and hence are part of an essential government function.

Third, a State could conceivably compensate the organizations that pick up litter by giving them a little roadside billboard for whatever message they want to post. Were it so, such billboards would not likely be government speech. But that is not what the States do, and it is certainly not what Missouri has done. Missouri does not simply give billboard space to organizations that pick up litter. Instead, Missouri has maintained control over what will be posted on its signs, thus preserving the messages as its own. This control is shown, for example, by Missouri's decision that its program is "not intended as a means of providing a public forum for the participants to use in promoting name recognition or political causes." MO. CODE REG., tit. 7, § 10-14.030(1). The fact that these regulations were not adopted until after this controversy began is of little consequence. They merely state formally what was already understood.

Fourth, if the Klan were to prevail in this case, the sign that Missouri would be required to post, using its typical sign format, would have the appearance of other informational signs posted by Missouri on its highways. It would say the following:

ADOPT-A-HWY
MI. LITTER CONTROL

KNIGHTS OF THE KU KLUX KLAN
REALM OF MISSOURI

See Bill Dedman, *Klan Gets Wish, But Fight Over Project Continues*, NEW YORK TIMES, Dec. 4, 1999, at A10 (photograph of sign posted by Missouri in response to court order). By its appearance, terms and manner of

erection, such a sign would cast the Missouri Adopt-A-Highway Program as the speaker.

Fifth, even if such a sign were regarded as merely giving *information*, it is a principle of First Amendment jurisprudence that an individual cannot generally be compelled to speak, even to convey facts he does not wish to express. *See generally, Pacific Gas & Elec. Co. v. Public Utilities Comm'n*, 475 U.S. 1, 11 (1986) ("[A]ll speech inherently involves choices of what to say and what to leave unsaid. . . . "); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) (upholding right of speakers to make decisions about omissions or additions to content of their own publications). The First Amendment is generally viewed as protecting citizens from the government and not the other way around. Yet, surely free speech principles do not impose upon the people of a State in their collective capacity a compulsion to speak from which they would be insulated as individuals.

Finally, such a sign conveys more than information, or even thanks. It advertises and promotes the State's adopt-a-highway program, a message that belongs to the State. It also implies a message of acceptance, a message that the State regards the Klan as a valuable member of society just like the Rotary Club or the Jaycees who have adopted the next stretch of highway down the road.[2] No

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[2] Such a message of *acceptance* is different from–and more fundamental than–a message of *endorsement*. A State might allow, for example, the Young Republicans to adopt one stretch of highway and the Young Democrats the next, and post signs recognizing each group without endorsing the views of either one. But, by posting such signs, the State would nevertheless

State views the Klan that way. Yet, it is precisely this message of official validation that the Klan seeks from Missouri, and it is for this reason, too, that the speech at issue is the speech of the State. The Court should grant certiorari so as to ensure that neither Missouri nor the other States are compelled to use their speech to legitimize the Klan.

THE KLAN MAY BE DENIED A SIGN UNDER *PICKERING* AND *NTEU*.

The Supreme Court has repeatedly recognized that government "may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large." *United States v. National Treasury Employees Union*, 513 U.S. 454, 465 (1995) ("*NTEU*"). To determine whether a restriction on citizen speech is justified, the Court balances "the interests of the [employees], as . . . citizen[s], in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services." *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). Based on the facts present here–and that would likely be present in other cases involving the Klan–the principles of *Pickering* and *NTEU* afford Missouri and other States broad discretion to deny adopt-a-highway signs to the Klan.

The job of maintaining the highways in general–and the task of litter removal in particular–are essential

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send the message that it views both groups as contributing members of society and within the pale of legitimacy.

government functions. This is so not only because the government has ownership or other control over the highways, but also because the task of litter removal is one for which the free market offers no incentives. States often perform this function through employees; however, recent years have seen the growth of adopt-a-highway programs in which private organizations volunteer to perform this task under the supervision of the State.

Litter removal *employees* are subject to the additional restraints that governments may impose upon the job-related speech of those it hires. So, too, *volunteers* who perform this same function may be similarly restrained. Accordingly, Missouri acted constitutionally when it retained the right to reject an application if "in its opinion, granting the request would jeopardize the program, be counterproductive to its purpose or have undesirable results such as increased litter, vandalism or sign theft." Mo. Code Reg., tit. 7, § 10-14.030(2)(A).

"[S]urely a public employer may, consistently with the First Amendment, prohibit its employees from being 'rude to customers'. . . . " *Waters v. Churchill*, 511 U.S. 661, 673 (1994). Yet it is much more disruptive to have government employees–or volunteers–engage in speech that reveals them to be not simply boors, but racists with a well-established reputation for violence. Thus, if employees hired by the government were to wear Klan garb or hoist a Klan sign while removing trash from the roadside, there is little doubt that the State could prohibit such job-related speech under *Pickering* and *NTEU*. The same is true when the Klan seeks to engage in similar expression while picking up litter as volunteers in a government program. *See, Texas v. Knights of the Ku Klux*

Klan, 58 F.3d 1075, 1079 (5th Cir. 1995) ("presence of Klan members on the highway in Klan attire picking up trash at the entrance to the project would invite strife"). What the Klan here seeks–a permanent sign announcing its presence–may be similarly restricted if a State reasonably concludes that the posting of such a sign is likely to disrupt the efficient delivery of government services.

This Court "ha[s] given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern." *Waters*, 511 U.S. at 673. It is not difficult to see how such disruption would occur here. For example, Klan signs are likely to become targets for litter hurled at them by passers-by wishing to vent their distaste for the Klan. *See* Bill Dedman, *Klan Gets Wish, But Fight Over Project Continues*, NEW YORK TIMES, Dec. 4, 1999, at A10 ("State police officials say they fear that motorists would go out of their way to litter on the Klan's mile of I-55."). Other forms of vandalism and theft are also likely to occur, as this case shows. *See id.* (describing unauthorized removal of two Klan highway signs in Missouri). Moreover, the presence of the Klan on roadside cleanup forays might well incite hostile action by other citizens, thereby resulting in breach of the peace, hazardous driving conditions and/or diversion of law enforcement resources to prevent or respond to such incidents.[3] Participation by

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[3] This is not to say that groups with views repugnant to the majority may be excluded from use of the streets as a traditional public forum for parades or other demonstrations. But, such right is always subject to reasonable time, place and manner regulations; and parade permits are not at issue here. The restraints that government may impose as an employer do not evaporate when the job takes place on the public streets.

the Klan could also diminish the incentive of other groups to participate and could lead governments to conclude that, on balance, the program is not worth pursuing. *See Klan Kept Out of State Road Program*, WASHINGTON POST, Apr. 3, 1999, at B3 (describing decision of Maryland's Anne Arundel County to discontinue its adopt-a-highway program because of the Klan).

Against these very real concerns about the efficiency of public services must be weighed whatever interests the Klan may have in commenting on matters of public concern. *See Pickering*, 391 U.S. at 568. What message would the Klan convey by a sign that starkly announces its presence but says little more? Is the message that even an avowedly racist group can be environmentally sensitive? Such organizational self-promotion is not a matter of public concern. Or is the message that the Klan is in town and that racial minorities had best beware? Such a message of intimidation may be a matter of public *alarm*, but it falls outside the legitimate public discourse that *Pickering* seeks to protect when it uses the phrase, "matters of public concern."

Even if the message conveyed by the work-related highway sign were a "matter of public concern," the denial of such a sign to the Klan would still leave open ample alternative channels of communication. The Klan could still deliver its message through all other lawful means of communication, including any billboards it might rent or lawfully post as a private group. The balancing test defined by *Pickering* and *NTEU* weighs in favor of the State and against the Klan. Thus, even if the

Klan were entitled to participate in picking up litter (an entitlement the *Amici* dispute[4]), it still would have no entitlement under the First Amendment to a State-purchased sign announcing its presence. The Court should hear this case in order to affirm the right of States to apply to the job-related speech of volunteers the same restrictions allowed with respect to the speech of employees.

CONCLUSION

This case is not about the protections afforded by the First Amendment to those who hold unpopular views. This case is about the right of the people–acting through their elected representatives–to engage in their own speech as a body politic. And it is about the right of the people to have a government whose essential operations are not unduly disrupted by the work-related speech of those whom it has recruited to carry out those operations.

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[4] The *Amici* take issue with the Eighth Circuit's conclusion that picking up litter is a form of speech. *See* Pet. App. 4a-5a, n.3. To the extent that any speech element may be involved, it is at most expressive conduct governed by the less demanding test described by this Court in *United States v. O'Brien*, 391 U.S. 367 (1968). Of course, as a practical matter, recognizing the State's right to deny the Klan a sign is likely to blunt the Klan's enthusiasm for assisting government efforts to maintain public highways.

For the foregoing reasons, the *Amici* respectfully urge the Court to grant the writ of certiorari sought by Missouri.

September 22, 2000

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